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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 118.

FLORSHEIM BROTHERS DRYGOODS COMPANY, LTD.,
Petitioner,
vs.
UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF.

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January, 1930.

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At the very outset we are forced to take exception to the statement on page 3 of the Government's brief that "The pertinent provisions of the statutes and Treasury Regulations involved are contained in the appendix to this brief" and to the corresponding statement in the appendix at page 23 that the brief extracts there printed at pages 23 and 24 are "the pertinent provisions of the Revenue Act of 1918." Those extracts omit the provisions of Sec. 250(a) of that Act to the effect that where an extension of time for filing a return is granted the time for the payment of the first

installment shall be correspondingly postponed, and of Sec. 250(e) of the same Act to the effect that in the case of the first installment the instructions and computation of the tax on the return shall constitute sufficient notice and demand. It has already been shown at pages 11-12 and 19-20 of our original brief that those two provisions are extremely pertinent as to the status of Form 1031-T, and the omission of all reference thereto in the Government's brief cannot but stamp it as inadequate.

Indeed the entire brief for the Government is far more eloquent in what it does not say than in what it does say. Our original brief was in accordance with the rules filed two weeks before the Government's brief and set up specifically at least six express and controlling reasons why Form 1031-T was *the return* within the meaning of the statutes. In spite of these reasons being thus set forth in such form that they could not be overlooked, and in spite of it being thus made so easy for the Government to reply to them *seriatim,* if they could be replied to, the Government has studiously avoided any discussion whatever of the more important of those reasons. There is not a word in its brief with respect to our exhaustive and we believe convincing arguments that Form 1031-T was a sufficient return to prevent the postponement of the payment of the first installment, that it was a sufficient return to constitute notice and demand for payment of the first installment, that it was a sufficient return to subject a taxpayer to penalties for failure to file it, and that it was a sufficient return to be expressly termed a return on its face. The significance of such omissions from the Government's brief cannot be overlooked. It can mean but one thing—those arguments cannot be answered.

That portion of the Government's brief devoted to Form 1031-T contains little more than a suggestion several times reiterated that the tentative return "disclosed insufficient information to enable the Commissioner to make an assessment" and that it would be "impossible" for the Commissioner to determine the correct amount of tax (pages 9, 11, 12, 19), together with a quotation from the opinion of the Court of Claims in the *Oak Worsted Mills* case which is introduced as well expressing the views of the Government. We will comment briefly on each of these points.

The suggestion, which on page 9 rises to the dignity of a categorical statement, that Form 1120 gave sufficient information to make an assessment, and that Form 1031-T did not do so, shows a complete misapprehension on the part of the Government counsel as to the actual procedure of the Bureau of Internal Revenue. Not only have we already cited actual instances of assessments being made on tentative returns (Brief, page 24), but it is common knowledge that assessments, and especially additional assessments, are constantly made on information entirely different from that set forth in the most voluminous and complete returns, and also frequently made in cases where there is no sufficient information in any return. Large taxpayers, corporate and individual, know only too well that assessments are regularly made on the basis of revenue agents reports alone. The reports of the Federal courts and of the Board of Tax Appeals are full of decisions in cases of this sort. For example, we find a number of cases where the Commissioner has been sustained in simply ignoring the return, if any was filed, and assessing an income tax on the gross amount of the taxpayer's bank deposits during the year less

only such deductions as might appear in his check book or be otherwise satisfactorily established. *Paul Polichroniades,* 2 B. T. A. 1263; *Max S. Rosenthal,* 3 B. T. A. 1349; *J. E. Strong,* 6 B. T. A. 417; *Louis Wald,* 8 B. T. A. 1003; *E. M. Green,* 11 B. T. A. 185; *Ginn-Coleman Co.,* 12 B. T. A. 550. These cases just cited are all of that one particular class, but there are many other reported cases, as well as hundreds of unreported ones, in which the Commissioner has likewise discarded altogether the information in the return and based the assessment entirely upon the taxpayer's book figures or other information reported by the revenue agent. It really has been one of the minor tribulations of counsel who have represented clients in tax matters that so many of the audit letters from the Bureau would as a starting point for adjustments use the income as shown in the books or as shown in the revenue agent's report instead of that shown in the return itself.

It cannot be overlooked that the reference in Sec. 239 to the return stating the items of gross income and deductions is scarcely self-enforcing in the same sense as is the specific requirement of the statute and regulations that no suit shall be maintained for the recovery of overpayments of taxes until a claim for refund has been filed and that such claims shall set forth all the facts relied upon in support thereof. Sec. 239 as a practical matter calls for some supplementary direction by the Commissioner as to whether he wants the items in a few general classifications or in a larger number of more detailed classifications, and it has regularly each year been so supplemented by the Commissioner in the preparation of the return forms. If the specific requirement with respect to the content of a claim for refund may be waived by the Government in

an ordinary case in which there were no specific exigencies—and it has been expressly so held by this Court in *Tucker v. Alexander*, 275 U. S. 228,—then by the same token and for the same reasons there could seem to be no question that this less definite requirement with respect to a statement of the items of income and deductions could in the same way be waived under the pressing circumstances which made such action absolutely necessary in the spring of 1919 to avoid serious financial embarrassment to the Government.

Turning now to the *Oak Worsted Mills* opinion, on which the Government has at page 12 of its brief practically staked its entire case, it takes but a brief analysis to show its inconsistencies and unsoundness. The keystone on which it is built is in direct conflict with one of the very pertinent provisions of the Revenue Act of 1918 which both the Court of Claims and the Government in its present brief have so conspicuously ignored. In the quotation at the middle of page 16 of the Government's brief the Court of Claims summarized what it thought to be the entire situation in these words:

> "The proposition on the part of the commissioner was simply that if the taxpayer would file an estimate of his taxes and a request for extension of time for filing a return and make payment of one-fourth the estimated tax, the extension would be granted, and he had a right to make these requirements."

On the contrary the law was simply that—

> "Where an extension of time for filing a return is granted the time for payment of the first install-

ment shall be postponed until the date of the expiration of the period of the extension, * * *"
(Revenue Act of 1918, Sec. 250(a), 40 Stat. 1082.)

In other words the court, and the Government in adopting the court's opinion, are entirely wrong as to the requirements which the Commissioner had a right to make. He had no right to require immediate payment of the first installment if he granted an extension of time, and their argument based on such an error necessarily falls with it. The Commissioner had authority to do only one of two things. Either he could require the filing of the return (and payment of the tax), or he could grant an extension of time for filing the return (and for payment of the tax). He could not, and indeed did not, require the filing of anything other than *a return.*

This opinion—which so well expresses the views of the Government—is so unfair and unjust in its effort to convey the impression that the tentative return procedure was solely and wholly a "valuable concession" for the sole benefit of taxpayers that its inconsistency cries out aloud on the very face of the opinion. For example, we read at the top of page 16 that this whole proceeding was a concession to the taxpayer because the Commissioner might grant or refuse an extension in his discretion, but if we turn back to the bottom of page 12 and the top of page 13 we find that the Court had already admitted that the Act was not approved until February 24, 1919; that the Bureau would be deluged with requests for extensions of time for filing returns; that *"most of these applications would have to be granted"*; and that the result would be "to postpone the payment of taxes in such an amount that *the Government might become embarrassed.*" This has

already been discussed at length in our original brief, but it is interesting to note that this situation was so patent and outstanding that it could not be concealed even in an opinion which sought to justify a holding the other way.

Even the dictionary definition upon which the Court of Claims and the Government seek to rely arises only to confound them. If they had looked further in that same Webster's Dictionary which gives the meaning "experimental" they would also have found that a synonym for tentative is "provisional," and turning the pages they would in turn have found one of the definitions of that term to be "serving as a provision for the time being." What better confirmation could be asked of our position than this definition suggested by the Government's own brief that the tentative return served as a return for the time being, *i. e.*, from the date of its filing on March 15, 1919?

Respectfully submitted,

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January, 1930.